4 CIVIL 33142

(Eooo608)

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE

UNITED STATES

October Term - 1985

No. 85-775

STEVEN MASTROPAOLO - Petitioner

vs.

HENRIETTE JULIENNE MASTROPAOLO,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

On Appeal from the Supreme Court of California

E. MICHAEL KAISER
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Attorney for Respondent

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To The Honorable Chief Justice and
Associate Justices of the
Supreme Court of the United States

HENRIETTE JULIENNE MASTROPAOLO, the Respondent herein, submits the following response to Petition of STEVEN MASTROPAOLO for Writ of Certiorari to the Supreme Court of the United States.

On October 16, 1970, MRS. MASTROPAOLO filed a Petition for Dissolution of Marriage in the Superior Court of the State of California, County of San Bernardino.

Default Judgment was obtained on May 22, 1973, but set aside three years later and a new Petition was filed. Trial was held in this matter on February 16, 1983, and the Court, among other things, awarded Wife 43.65 percent of the retirement portion of her husband's pension as her community property interest. (The MASTROPAOLOS were married for 87.30 percent of his military career.) Husband, Major MASTROPAOLO, appealed the court's decision. The Court of Appeal, Fourth District, Division 2, affirmed the division.

Husband/Petitioner sought review by the California Supreme Court. Said review was properly denied. The Court of Appeals in accordance with Federal Law and recent California decisions upheld the division of that portion of husband's retirement pension attributable to longevity. No portion of these funds attributable to disability were divided and were specifically declared husband's separate

property. This decision clearly follows the rulings in In Re the Marriage of Stenquist II, (1983) 145 Cal.App.3d 430.

Wife/Respondent does not dispute that at present the Petitioner is rated 100 percent disabled and was retired pursuant to 10 USC 1210 and 1201. Respondent does object to the application of Husband's disability rating to distort the meaning of the Federal Law so as to allow Husband to completely swollow up the Wife's community property interest by claiming that the 100 percent disability rating entitles Husband to 100 percent of his disability/retirement pay. That issue was raised in Stenquist II, and decided there.

Attached to the Petition are three documents (Appendices C, D and E) which Petitioner urges the court to accept as evidence of (1) military service of less than twenty years, and therefore non-eligibility for retirement, (2) retirement

on 100 percent disability pay, and (3) absence of any "disposable retired or retainer pay."

A careful examination of Exhibit "C" does show a date of entry of October 24, 1952. However, for retirement purposes, Petitioner served twenty years, one month and eight days as noted in his retirement orders (Appendices D and E). In fact, if they used the date of retirement in Appendix "E", December 22, 1972, he served more than the time in which retirement was calculated.

In any case, it seems very clear from still another document, which was entered into evidence at the time of trial and appendixed here, that Major Mastropaolo was eligible to retire and receive a pension based on longevity alone. He was, however, also eligible for additional pay because of his disability. Clearly, he had an election, and by not responding, the higher rate was elected for him on his behalf.

None of his additional pay was divided as community property.

We agree with Petitioner that the language of the Uniformed Services Former Spouses' Protection Act (USFSPA) might be ambiguous in certain circumstances, particularly where time served is short of twenty years and no election is offered. But that is not the case here. Following the clear intent of USFSPA, the military pension was divided as community property. To rule otherwise would inevitably cause a stampede among military retirees to claim some mental disability towards the end of their careers to avoid paying their wives the community property interest set forth in USFSPA. The legislation was enacted to protect wives, not to cheat them. Particularly in a case such as this where the wife is presently more disabled than the husband.

CONCLUSION

The decision of the California cases of Stenquist II and Mastropaolo are not in direct conflict with the language 10 USC 1408. Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CHASE, ROTCHFORD, DRUKKER & BOGUST
A LAW CORPORATION

By: E. Michael Kaiser
E. MICHAEL KAISER

PROOF OF SERVICE
BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

I, PENNY LIGHTLE, am a citizen of the United States and employed in the County aforesaid; I am over the age of eighteen years and not a party to the above-entitled action; my business address is 334 West Third Street, Suite 300, San Bernardino, California 92401.

On January 30, 1986, I served the within Response to Petition for Writ of Certiorari to the Supreme Court of the United States on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope, postage prepaid in the U.S. Mail, at San Bernardino, California, addressed as follows:

PROOF OF SERVICE BY MAIL (continued)

Mr. Mark C. Schnitzer
Attorney at Law
Hanover & Schnitzer
665 North Arrowhead Ave.
San Bernardino, CA 92401

Mr. John P. Wade
Attorney at Law
370 West Sixth Street
Suite 100
San Bernardino, CA 92401

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 30, 1986, at San Bernardino, California.

Penny Lightle
PENNY LIGHTLE

CERTIFIED MAIL

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS AIR FORCE ACCOUNTING AND FINANCE CENTER

3800 YORK STREET

DENVER, COLORADO 80205

12 MAY 1971

RPT

Computation of Retired Pay - MASTROPAOLO, Steven
559 40 2663

Major Steven Mastropaolo, USAF (Ret)
2705 LaPraix
Highland CA 92346

Dear Major Mastropaolo

Military Personnel retiring from service under disability laws are authorized to elect retired pay computed on either their years of service credits or percentage of disability existing at time of retirement.

The Comptroller General of the United States has held that our administrative establishment and payment of the higher of the two rates does not constitute an election by the retiree. Administrative establishment of the higher rate is acceptable, but must ultimately be supported by an election on the part of the retiree. An "election" for this purpose may be a letter to the retiree apprising him of the two rates applicable, his right to elect, and that his failure to object to the established rate will constitute an election of that rate.

Your retired pay computed on service credits amounts to $ 615.15 ; whereas computed on your disability rating it amounts to $ 661.21 .

We have established the higher of the above monthly rates for payment. If this is acceptable to you, no further action on your part is necessary. If you prefer to elect the other method of computation, you must notify us of that fact within 45 days from the date of this letter.

In the event we do not hear from you within 45 days we will consider that you have elected the higher of the two rates.

Sincerely

Lennox T. Waltman

LENNOX T. WALTMAN
Retired Pay Division
Directorate of Reserve
& Retired Pay Operations

1 Atch
AFAFC Form 0-459

524/OCT 70

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APPENDIX "A"